Nos. 02-241 & 02-516

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In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, et al.,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF JOHN CONYERS, JR., MEMBER OF CONGRESS; JOHN D. DINGELL, MEMBER OF CONGRESS; CHARLES B. RANGEL, MEMBER OF CONGRESS; FORTNEY PETE STARK, MEMBER OF CONGRESS; EDWARD J. MARKEY, MEMBER OF CONGRESS; GEORGE MILLER, MEMBER OF CONGRESS; DALE E. KILDEE, MEMBER OF CONGRESS; MARTIN FROST, MEMBER OF CONGRESS; ROBERT T. MATSUI, MEMBER OF CONGRESS; MARTIN OLAV SABO, MEMBER OF CONGRESS; BARNEY FRANK, MEMBER OF CONGRESS; STENY H. HOYER, MEMBER OF CONGRESS; ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are Members, Delegates and a Resident Commissioner of the United States House of Representatives, and the Mayor of the City of Detroit, Michigan.[2] As elected representatives, *amici* are keenly aware that the promise of participation is one of the central tenets of our democracy. As legislators and policymakers, *amici* have worked to enhance political, economic and educational participation by members of racial minority groups. Encouraging such participation is in the public interest, and will be preserved by permitting the race-conscious decision making necessary to ensure that important public institutions are being made available to all. Under the standard announced in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), the Court's decision in this case will apply with equal force to public officials at federal, state and local levels, and will affect the legislative and policy options available to *amici* to address the needs and concerns of their constituents.

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[1] This brief is filed with the written consent of all parties. Consent letters are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] *Amici* submit this brief in their individual and private capacities and not on behalf of any local, state or federal legislature or executive agency.

SUMMARY OF ARGUMENT

The race-conscious admissions policies of the University of Michigan (the "University") and the University of Michigan Law School (the "Law School") represent a constitutionally appropriate exercise of the authority and flexibility accorded to university admissions officials. Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) established the constitutionality of using race as one factor in higher education admissions. In Justice Powell's view, a state university's constitutional authority to consider race was not limited to instances of remedying identified discrimination. Rather, he located one source of that authority in the university's academic freedom under the First Amendment, and the substantial contributions that a diverse class of students makes to the educational mission of institutions of higher education and the political participation and representation that lie at the foundation of American society and governmental institutions. Under *Bakke*, the educational and political benefits that result from a diverse student body are sufficiently compelling interests to justify race-conscious governmental action.

The reasoning underlying Justice Powell's decision in *Bakke* has become part of the fabric of the Court's subsequent equal protection jurisprudence. Relying on the Court's jurisprudence, government officials, including those in Congress and the executive branch, have established numerous programs that require decision makers to take race into account to address matters ranging from research to road construction to entrepreneurship to management of federal educational assistance. Sustaining the view that the Equal Protection Clause permits limited race-conscious decision making will preserve the flexibility

that governmental decision makers need to address problems defined by their impact on particular racial groups, while limiting the range of constitutionally acceptable solutions to those that do not involve using race as the predominant factor in the decision making. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995). By contrast, eliminating race-conscious decision making as a tool in state higher education admissions would create a constitutional conflict with a state university's academic freedom under the First Amendment, threaten broad access to government resources and services, and put at risk the full and complete political and economic participation for citizens of all racial backgrounds.

To preserve the significant political, social and economic gains for all Americans that result from the current role of race in higher education admissions, the Court should (1) hold that the educational and political benefits that flow from achieving diversity in the context of higher education constitute a sufficiently compelling governmental interest to support race-conscious state decision making under the Equal Protection Clause; (2) uphold the consideration of race as one factor in governmental decision making so long as race is not the predominant criterion or goal; and (3) reaffirm that the role of race in governmental decision making is not limited to remedying specific instances of identified discrimination.

ARGUMENT

I. RACIAL DIVERSITY IN HIGHER EDUCATION FURTHERS COMPELLING GOVERNMENTAL INTERESTS THAT STRENGTHEN AMERICAN DEMOCRACY

Contrary to what Petitioners and their *amici* imply, "race is a factor in our society."[3] It is a life-defining experience for most in the same way as whether one is male or female, grows up rich or poor, is raised in an urban, suburban or rural setting or hails from Montana or Georgia. The issue before the Court is whether the Equal Protection Clause permits state educators to consider race, together with these other factors, in higher education admissions. For the past twenty-five years, the Court's equal protection jurisprudence regarding consideration of race has been guided by Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). There is no question that Justice Powell's opinion in *Bakke* squarely permits colleges and law schools, including those at the University of Michigan, to consider race as one of several factors in its admissions process to obtain the benefits of educational diversity. These benefits include the enhanced economic, social and political participation of racial minorities.

In a democratic system, a group of citizens must be able to obtain their government's assistance in preserving access to the "transactions and endeavors that constitute life in a free society." *Cf. Romer v. Evans*, 517 U.S. 620,

[3] *Meet the Press* (NBC television broadcast, Jan. 19, 2003) (comments of Condoleezza Rice).

633 (1996) (striking down ban on protections against discrimination for persons of gay, lesbian or bisexual orientation on grounds that the ban infringed those persons' fundamental right to participate in the political process). Thus, core democratic values are enhanced by the exposure and interactions that flow from a class containing a critical mass of students from diverse backgrounds, which strengthens the fabric of American democracy.

The Court's equal protection jurisprudence permits government officials to take race into account as one of many factors to promote universal access to government programs and services, so long as it does not dominate the process or control the outcome. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995). The flexibility that the Court has allowed government decision makers preserves the core democratic values of full and fair political participation and responsive government for minority citizens. The need for flexibility and the exercise of discretion is especially compelling in the educational context. State educational institutions are among the most important tools available to the states to aid in the creation of model citizens. Moreover, educational decisions are accorded First Amendment protection as an exercise of academic freedom.

A. Considering Race As One Factor In Admissions Is Constitutional

This Court has acknowledged that education is critical to "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwich*, 441 U.S. 68, 76

(1979). Research has shown that for racial minorities, education at highly selective schools is associated with higher levels of civic and political participation. *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: THE LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 119-54, 173-74 (1998) (describing higher political participation and civic involvement of African Americans who attended selective schools compared with those who have not attended such schools). Including a critical mass of students who are members of racial minority groups as part of a diverse class of university or law school students both fosters levels of participation necessary to sustain an effective democracy and improves the quality of political representation.

Higher education provides a singular opportunity for citizens to meet, live with, learn about, and learn from people of other backgrounds. Exposing all students to a broad range of ideas, practices and experiences, and the interactions among the students that occur as a result, eventually permits the state to draw on enhanced political participation and representation. *Amici*'s experience accords with studies showing that heightened exposure to and engagement with peoples of different races and cultures foster an increased sense of commonality across racial and cultural lines and an elevated ability to understand the perspectives of others. *See* Patricia Gurin, *Expert Reports: Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363, 399-401 (1999). A sense of commonality and receptivity is necessary for representatives such as *amici* to build support in political institutions for initiatives critical to protect the

interests of their constituents. As Justice Powell noted in *Bakke*, the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples." 438 U.S. at 313 (Opinion of Powell, J.) (internal quotation marks omitted).

Justice Powell's conclusion reflects the role race often plays as a defining experience that shapes people's ideas and mores. Consequently, Justice Powell and four other justices agreed that a state institution of higher education could consider race as "one element . . . in the selection process" for creating such a class, so long as that process was not shown to be the functional equivalent of a quota system. *Id.* at 318-20 (Opinion of Powell, J.).

Relying on Justice Powell's opinion in *Bakke*, Michigan educators, along with many others throughout the United States, have adopted race-conscious admissions programs that seek to include racial minorities while preserving the role of many other important factors. The diversity created through these efforts redounds educational and political benefits to society. It is these educational and political benefits that flow from diversity among students in higher education, rather than the fact of the diversity itself, that *amici* ask the Court to affirm as state interests sufficiently compelling to justify considering race as a factor in the admissions process. *See Bakke*, 438 U.S. at 307, 315 (Opinion of Powell, J.).

B. Non-Remedial Justifications Can Support Race-Conscious Governmental Action

For the past quarter century, Justice Powell's opinion in *Bakke* has been the cornerstone of this Court's framework for evaluating challenges to governmental uses of

race. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court adopted the view, expressed by Justice Powell in *Bakke*, that strict scrutiny should apply to facially race-based governmental classifications regardless of whether those classifications benefited members of a group that historically had been the subject of discrimination. *Croson*, 488 U.S. at 493-94 (citing *Bakke*, 438 U.S. at 289-90 (Opinion of Powell, J.)). Under strict scrutiny, governmental uses of race must be narrowly tailored to accomplish a compelling state interest. *Croson*, 488 U.S. at 506. States have a compelling state interest in remedying identified past or present discrimination. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citing *United States v. Paradise*, 480 U.S. 149, 167 (1987) (Opinion of Brennan, J.); *id.* at 190 (Stevens, J., concurring); *id.* at 196 (O'Connor, J., dissenting)). *Accord Bakke*, 438 U.S. at 307 (Opinion of Powell, J.).

Remedial measures, however, comprise just one part of the permissible universe of compelling state interests that may justify governmental use of race in decision making. For example, in recent redistricting decisions, a majority of justices have recognized that states have a sufficiently compelling interest in avoiding violations of federal anti-discrimination law to permit the use of race as a factor in redistricting. *See Bush v. Vera*, 517 U.S. 952, 977-78 (1996); *id.* at 994 (O'Connor, J., concurring); *id.* at 1034-35 (Stevens, J., dissenting); *id.* at 1065 (Souter, J., dissenting). The Court's recognition of a state legislature's compelling interest in avoiding liability under federal anti-discrimination law when engaged in redistricting resonates with the decisions of all nine justices who participated in the *Bakke* decision.

The issue here is whether the benefits that flow from educational diversity are sufficiently compelling non-remedial justifications to justify Michigan's race-conscious admission policies. The educational and political benefits that result from a diverse student body were among the non-remedial compelling state interests that Justice Powell envisioned supporting appropriate race-conscious programs and policies implemented through the democratic process that would pass strict scrutiny. *Bakke*, 438 U.S. at 299, 311-12 (Opinion of Powell, J.). Affirming that these political and educational benefits provide a compelling governmental interest to support a race-conscious admissions plan would accord with this Court's recent equal protection decisions.

C. Eliminating Educational Diversity As A Compelling State Interest Will Have Negative Consequences For The Ideal Of The Rule Of Law

This Court has relied on Justice Powell's opinion in *Bakke* as a foundation for developing an adjudicative framework for evaluating challenges to governmental uses of race. This case presents this Court's first opportunity since *Bakke* to revisit the application of the Equal Protection Clause to consideration of race as a factor in the context of higher education admissions. To repudiate Justice Powell's recognition of educational diversity as a compelling state interest in the very context in which so many of the Court's other equal protection principles were first articulated would seriously undermine the integrity of the juridical approach this Court has adopted for interpreting governmental uses of race under the Equal Protection Clause, and tear at the fabric of the law.

The doctrine of *stare decisis* informs the Court's judgment when reconsidering prior constitutional decisions. "[E]ven in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Whether or not the current membership expresses doubts about the correctness of an earlier decision, the Court considers the costs of repudiating that decision to the rule of law. *Id.* In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court described four considerations "designed to test the consistency of overruling a prior decision with ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Id.* at 854-55. In the context of affirmative action in higher education, these considerations show that this case does not present the "special justification" required for overturning *Bakke*. In the broader context of the Court's equal protection jurisprudence, the *stare decisis* analysis illuminates the foundational position *Bakke* has assumed in the Court's equal protection jurisprudence and that of the lower courts, and the damage that would be done to that jurisprudence should *Bakke* be overturned.

Although the Court has further clarified the requirements of the Equal Protection Clause since *Bakke*, the Court's jurisprudence has not "developed so as to have left the old rule no more than a remnant of an abandoned doctrine." *Casey*, 505 U.S. at 855. Rather, the coherence of the current state of the Court's equal protection jurisprudence, which relies heavily on *Bakke*, is reflected in the

lower court's capable administration of the principles announced in *Bakke* and its progeny. *See Casey*, 505 U.S. at 854 ("[W]e may ask whether the rule has proven to be intolerable simply in defying practical workability."). Consistent with this jurisprudence, lower courts weigh whether proffered non-remedial justifications for race-conscious decision making rise to the level of a compelling interest. *Compare Wittmer v. Peters*, 87 F.3d 916, 919-20 (7th Cir. 1996) (permitting juvenile boot camp guards to be selected partially on basis of race) *and Martin v. Sch. Dist. of Phila.*, 1995 WL 564344, *2 (E.D. Pa. Sept. 21, 1995) ("[T]here can be little doubt that the state's interest in ensuring equal educational opportunities across race lines is a compelling one.") *with Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1998) (holding that ensuring racially diverse radio programming is not a compelling interest). Lower courts that accept *Bakke* as controlling on questions of affirmative action in public education strike down those admissions programs which use racial quotas, *e.g., Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 378 (W.D. Ky. 2000), and uphold those programs in which race is used as one of many diversity factors. *E.g., Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000). These decisions indicate that the lower courts are capably following the rules announced in *Bakke* and that the required determinations "fall within judicial competence." *Casey*, 505 U.S. at 855.

The factual circumstances underlying Justice Powell's opinion in *Bakke* remain the same, and are viewed the same, today. The state of public higher education today does not present the situation where "facts have so changed, or come to be seen so differently, as to have

robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 855. Justice Powell explained that admitting a diverse student body is necessary to universities' missions to enhance the marketplace of ideas and is within the universities' First Amendment academic freedom. *Bakke*, 438 U.S. at 311-14 (Opinion of Powell, J.). Neither the Court's nor the country's views on the importance of universities' academic freedom has changed since 1978. And as Professor Patricia Gurin's large scale longitudinal study shows, educational benefits flowing from diverse student bodies continue to benefit all students. Gurin at 364-65. Our view that diversity is an integral part of the "robust exchange of ideas" remains the same today as Justice Powell's view in *Bakke*.

Finally, the Court should consider the cost of repudiating *Bakke* "as it would fall on those who have relied reasonably on the rule's continued application." *Casey*, 505 U.S. at 854-56, 864-69. Repudiation of *Bakke* would fall heavily upon public educators. Nearly every public institution of higher education in the country has adopted a race-conscious admissions program crafted on *Bakke*. BOWEN & BOK at 7. Overturning *Bakke* would result in a national upheaval of admissions policies and confusion for those admissions officers at public universities and professional schools. More importantly, it would weaken the ability of public universities to assemble diverse student bodies necessary to ensure the "robust exchange of ideas."

Briefing of certain *amici* suggest that *Bakke* can be affirmed consistent with holding the University and Law School admissions practices unconstitutional. That result cannot with intellectual honesty be sustained. *Bakke* stands expressly for the right of educators to exercise discretion in exactly the way Michigan educators have.

Moreover, denying educators the tools Michigan employs would substantially undermine the ability to achieve the benefits *Bakke* sought to advance. Public educators in those states that prohibit race-conscious admissions policies have struggled with how best to ensure a diverse exchange of viewpoints, and have been forced to substitute imprecise proxies for diversity. *See infra* Part II.B. Their struggles have often been unsuccessful, especially in the most elite public institutions. *Id.* Moreover, their struggles often result in abandoning or reducing the importance of other important factors in the admissions process. Forcing selective state schools to employ admissions methodologies that limit their ability to craft a class of individuals with a broad range of characteristics would infringe upon public universities' First Amendment freedom "to provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

The cost of overturning *Bakke* would also weigh upon state and federal legislators. Lawmakers need clear guidance form the Court to square potential legislation with the Equal Protection Clause. *Cf. Romer*, 517 U.S. at 632 ("The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance to the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.") That guidance is now provided by *Bakke*, the Court's subsequent equal protection decisions building on *Bakke*, and rulings from the lower courts. Permitting race-conscious decision making in the context of a multi-factor process provides guidance and discipline to elected officials regarding the types of policies

and legislation they can implement to address the concerns of their constituents. This in turn maintains the ability of identifiable groups of constituents to obtain the assistance of government to address their problems. Overturning *Bakke* would destabilize equal protection law and muddy the waters for legislators – a result counter to the purpose of *stare decisis*.

Bakke resolved "an intensely divisive controversy," *Casey*, 505 U.S. at 866, and has "become part of the national culture." *Dickerson*, 530 U.S. at 443. In these circumstances, overruling the earlier precedent could undermine public confidence in the judiciary and weaken the rule of law. *Casey*, 505 U.S. at 866-69. *Bakke* settled the national controversy about affirmative action in 1978, a debate that is no less divisive today.[4] *Cf. Casey*, 505 U.S. at 869 (noting that public pressure to overrule *Roe v. Wade*, 410 U.S. 113 (1973) was more intense then than shortly after *Roe* was decided). After *Bakke*, public schools around the country maintained their race-conscious admissions programs, modeling the programs after Justice Powell's opinion. *See* Kenneth L. Karst & Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 7 (1979) (noting that *Bakke* provides a "how-to-do-it manual for the admission of minority applicants to professional schools"). Vacillating on the meaning of the Equal Protection Clause

[4] A January 2003 Westlaw search of the journals and law reviews database ("JLR") resulted in 2,458 pieces published in 2000 or after including both "affirmative action" and words beginning with "constitution". By comparison, replacing "affirmative action" with "abortion" yielded 635 hits. A January 2003 Google search for "affirmative action" and "constitution" yielded approximately 121,000 hits; "abortion" and "constitution" yielded approximately 174,000 hits.

in the context of higher education could cause the harms to the Court and the country emphasized in *Casey*.

II. THIS COURT'S FRAMEWORK FOR DISTINGUISHING LEGITIMATE RACE-CONSCIOUS DECISIONS FROM UNLAWFUL QUOTAS PRESERVES THE EFFICACY OF OUR FEDERAL SYSTEM

The "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). In their role as public officials, *amici* must address practices and problems defined by their impact on one or more groups of individuals who share a common racial background. The Court has developed a standard for adjudicating race-conscious governmental decision making that recognizes the "intrusive potential of judicial intervention in the legislative realm." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This standard provides the necessary flexibility to enable public officials to meet their responsibilities in these situations.

A. Race May Be Considered as One of Many Factors in Governmental Decision Making In Some Circumstances

The Equal Protection Clause does not mandate race-neutral decision making in all contexts. *See Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("This Court never has held that race-conscious decision making is impermissible in all circumstances."). The Court regularly distinguishes

between three types of governmental decision making: (1) race-determinative,[5] (2) race-conscious,[6] and (3) race-neutral.[7] Governmental awareness of race does not implicate the Equal Protection Clause unless it has a substantive effect on the outcome of the government's decision-making process. *See Bush v. Vera*, 517 U.S. 952, 968 (1995) (O'Connor, J., principal opinion) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify. . . ."). *Cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (Opinion of Powell, J.) (stating that to extent race was considered only to correct for inaccuracies in predicting academic performance "it might be argued that there is no 'preference' at all"). Over the past twenty-five years, the Court has developed and followed distinct but consistent approaches to assessing governmental action involving race-conscious

[5] "Race-determinative" decision making occurs where an individual's race determines or controls (a) the outcome of a decision-making process with respect to that individual; or (b) that individual's ability to access a service or resource made available by the government.

[6] "Race-conscious" decision making occurs where (a) a governmental actor takes an individual's race into account; and (b) where the consideration of that individual's race either (i) has some effect on the outcome of a decision-making process but does not control or determine the outcome with respect to that individual; or (ii) affects the individual's chances of accessing a service or resource provided by the government, without affecting his or her eligibility for that service or resource. Where an individual's race predominates in the decision, it becomes race-determinative.

[7] "Race-neutral" decision making occurs where an individual's race has no effect on either (a) the outcome of a governmental decision-making process with respect to that individual; or (b) the individual's ability to access government-supplied resources or services.

decision making, and has scrutinized that decision making in a way that preserves the discretion and flexibility for legislators and policy makers that is an integral part of our federal system.

Where race controls the outcome of government decision making, it can only be justified where it is narrowly tailored to a compelling state interest and race-neutral alternatives will not accomplish the same goal. *Adarand*, 515 U.S. at 237. Thus, absent a compelling state interest, neither Richmond, Virginia in *Croson* nor the University of California, Davis Medical School in *Bakke* could rigidly reserve for minorities a portion of those programs' available opportunities. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989); *Bakke*, 438 U.S. at 299, 305 (Opinion of Powell, J.).

By contrast, where a state takes race into account to influence, rather than determine, the outcome of a decision-making process, this Court has taken a different approach. Drawing on the distinction that Justice Powell established in *Bakke* between a legitimate race-conscious decision-making process and a process that is functionally race-determinative, this Court has held that a state may engage in race-conscious decision making so long as individuals' race is not the predominant factor motivating the decision. *Miller*, 515 U.S. at 915. As the Court has noted, Justice Powell never stated that applying strict scrutiny to all racial classifications would inhibit the "rough compromise" of the democratic process from implementing such classifications where they are appropriate. *Adarand*, 515 U.S. at 224 (quoting *Bakke*, 438 U.S. at 299 (Opinion of Powell, J.)). Recent redistricting decisions offer substantial guidance as to how and under what

circumstances government actors may take race into account in decision making.

The Court's most recent application of its race-consciousness standard is a prime example. In *Easley v. Cromartie*, 532 U.S. 234 (2001), the Court held that the North Carolina legislature constitutionally considered race in crafting a minority opportunity district for its reapportionment plan where the district boundaries could be explained equally by race or political behavior. *Id.* at 257-58. By focusing on whether North Carolina had used race in a way that overshadowed other permissible aspects of the redistricting process, the Court's approach reflects a tolerance for the use of race in governmental decision making that varies with the context of the decision-making process, and the amount of influence an individual's race has on the final outcome of that process. As a decision-making process involving a number of factors in a context of historical judicial deference, redistricting suggests the circumstances in which the Court's race-consciousness standard provides the most appropriate means of assessing whether a particular use of race is constitutional.

The non-remedial considerations and need for freedom from judicial interference that led to this Court's adoption of the predominant motivating factor test to evaluate race-conscious decision making in *Miller* are also present in the educational context. Institutions of higher education long have received significant latitude from this Court in the area of academic freedom. Within constitutional constraints, an institution of higher education may "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S.

234, 263 (1957) (Frankfurter, J., concurring). *Accord, Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (requiring restrained judicial review of academic decisions). Recognizing this tradition in his opinion in *Bakke*, Justice Powell determined that an institution of higher education was entitled to discretion in fashioning its admissions decisions unless its policy represented the "functional equivalent of a quota system." *Bakke*, 438 U.S. at 318 (Opinion of Powell, J.).

Critics erroneously decry the University and the Law School's admission of a "critical mass" of minority students as a "quota". This rhetoric does not demonstrate that race determines the outcome of the admissions process. *See Miller*, 515 U.S. at 916 ("Plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."). Indeed, if the mere establishment of a goal relating to a certain level of participation results in a constitutional violation, numerous federal programs that provide for equitable access to government contracting markets or other resources may be at risk. For example, Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), establishes a program designed to enhance the economic competitiveness of disadvantaged small businesses (including those owned or controlled by members of certain specified racial minority groups) and provide access to the federal procurement market. In implementing this program, the Small Business Administration uses a benchmarking method to determine the number and types of firms that will participate in the program. *See* 13 C.F.R. § 124.103-.105, .1002. Similarly, minimum participation goals for disadvantaged businesses, historically black colleges and universities and other minority institutions, and other colleges and universities with a

student body where a particular racial minority group exceeds a specific threshold are to be implemented where practicable under the Energy Policy Act of 1992, 42 U.S.C. § 13556, and the Clean Air Act Amendments of 1990, 42 U.S.C. § 7601.

The government also sets and enforces race-conscious participation goals in providing access to educational resources. The No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 *et seq.*, was enacted to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education" and, among other things, to "clos[e] the achievement gap . . . between minority and non-minority children." *Id.* § 6301. It requires public schools to create performance based standards and implement testing to measure students' progress towards those goals at various grade levels. *Id.* § 6311. Under the racial accountability standards of the Act, schools must break down test results by race and ethnicity. *Id.* § 6311(b)(3)(C)(xiii). To avoid sanctions such as staff reorganization, reduced federal funding, or privatization, schools must demonstrate that each major racial and ethnic group is adequately progressing towards performance standards. *Id.* § 6311(b)(2)(B), (C)(v)(II)(bb). Those schools in which any subgroup falls below the minimum testing level will be designated for improvement and subject to sanctions. *Id.*

These federal programs consider race as one of several factors in providing access to government resources and services for disadvantaged individuals. No less than the Michigan admissions programs, these federal programs must seek enough participation to achieve their intended purposes. Both sets of programs should receive the deference of the kind described by Justice Powell in *Bakke* and

traditionally provided by this Court in reviewing academic and political decisions. Being honest and straightforward about the minimum participation needed to achieve otherwise constitutionally permissible goals should not be punished. There is a constitutionally significant difference between a quorum and a quota.

Preserving the ability of governmental actors to engage in race-conscious decision making will maintain the flexibility this Court has traditionally granted to political and academic actors. As public officials responsible for ensuring effective access to government resources and institutions by all citizens, *amici* have found that racial accountability provisions have a significant ability to preserve access to such resources. In order for such statutes to be effective, those governmental decision makers responsible for implementing the rules must be able to incorporate race into their implementation and corrective action efforts where warranted. Application of this Court's race-consciousness standards will preserve the flexibility that governmental decision makers need to address problems with racial contours, while limiting the scope of permissible solutions to those that do not involve using race as the predominant factor in decision making.

B. Sustaining Limited Race-Conscious Decision Making Preserves Necessary Flexibility for Governmental Actors

Detractors of the University and Law School's policies would find both plans unconstitutional based on the purportedly race-neutral admissions policies in place in California, Florida and Texas. *See, e.g., Grutter v. Bollinger*, 288 F.3d 732, 806-08 (6th Cir. 2002) (Boggs, J., dissenting); Brief of *Amicus Curiae* the United States in

Support of Petitioner in *Grutter v. Bollinger*, at 13-21; Brief of *Amicus Curiae* the United States in Support of Petitioner in *Gratz v. Bollinger*, at 13-15, 18; Brief of *Amicus Curiae* the State of Florida, at 8-10. They assert that results of the admissions policies adopted by these states show that race-neutral decision making is a viable alternative for ensuring minority representation. The assumptions and data underlying this argument do not bear scrutiny.

Upon closer examination, the overall admissions schemes of California, Florida and Texas universities are not race-neutral. Rather, they rely heavily on other race-conscious actions, such as race-targeted scholarships, financial aid, and recruitment and retention efforts. *See* Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* 32-37, *at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf (Feb. 7, 2003); Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 51-58, *at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf (Feb. 7, 2003). These components show that far from being race-neutral, California, Texas and Florida admissions officers have just shifted their race-consciousness to a different stage within the admissions process.[8]

[8] The persistence of poor minority enrollment results at the Berkeley and Los Angeles campuses of the University of California caused the University of California Regents to reverse their decision to ban any consideration of race for admissions purposes by the state's

(Continued on following page)

Further, the enrollment data offered to show that the new policies provide adequate minority representation are misleading. These data focus on the enrollment of minority students system-wide, rather than in individual schools, particularly the most selective schools. Minority applications and enrollment at Florida, California and Texas flagship institutions have significantly declined. *See* Horn & Flores at 45-51; Marin & Lee at 27-36. The reduction of diversity at the most selective campuses demonstrates that these plans do not offer any meaningful alternatives to the University and Law School's consideration of race in admissions.

Although searching analysis seriously undermines the argument that there are effective race-neutral alternatives to the Law School's consideration of race, there is a more compelling reason not to mandate such alternatives in place of race-conscious decision making. Mandating admissions programs of the type adopted in California, Florida and Texas would create a conflict with the constitutionally protected discretion of University officials. These alternative admissions plans largely provide for mandatory admission to a state university campus for students who place within a certain percentage at the top of their high school graduating class. By requiring schools to admit individuals purely on the basis of their academic achievement in high school, such policies eliminate the discretion that past decisions of this Court have granted to institutions of higher education. Without meaningful

colleges and universities. *See* Cathy Cockrell, *UC Regents Rescind SP-1, SP-2*, BERKELYAN, May 17, 2001.

control over the make up of their student bodies, admissions officials can not create the substantive diversity that Justice Powell sought to preserve in *Bakke*. This is not just a matter of racial diversity. Admissions officials' discretion with regard to economic diversity, gender diversity, geographic diversity, individual's life experiences and admitting legacies would also be threatened. A decision by this Court that the Equal Protection Clause requires state universities to adopt admissions policies of the type described by the United States, rather than allowing educators to choose a race-conscious admissions policy, will create a constitutional conflict with the universities' rights under the First Amendment. Such a decision could also restrict the ability of elected representatives to provide broad access to government resources and services and to promote full and complete political and economic participation.

C. Congress and The Executive Branch Have Continuously Endorsed Race-Conscious Decision Making as a Constitutional Means Of Promoting Full and Complete Political and Economic Participation For All Americans.

Congress' commitment to ensuring access to higher education for racial minorities is at least as old as the Fourteenth Amendment itself. In 1866, Congress passed the Fourteenth Amendment to eliminate any possibility of a constitutional challenge to the Civil Rights Act and the expansion of the Freedmen's Bureau powers enacted that same year. *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 104-07 (1998); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth*

Amendment, 71 VA. L. REV. 753, 784 (1985). As with the Fourteenth Amendment, the original purpose and function of the Freedman's Bureau was to provide various forms of aid to African Americans in the South during the Reconstruction era. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 243 (1988). Among the many areas in which the Bureau exerted its efforts on behalf of African Americans, none has endured so well or so fruitfully as education. Howard University, along with the many other historically black colleges and universities, has played a substantial role in educating black Americans who have contributed to the development and improvement of American democratic systems.

Following this Court's decisions in such cases as *Brown v. Board of Education*, 347 U.S. 483 (1954), Congress enacted the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq*. Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d), requires recipients of federal funding to avoid taking any action that would discriminate against or exclude any person on racial grounds. Responsibility for enforcing Title VI in the educational arena falls to the U.S. Department of Education. The Department's regulations implement Congress' desire that recipients of federal funds be accountable for providing access to their programs. This responsibility requires an awareness of race and may require action to correct practices that exclude or disadvantage racial minorities. Specifically, the Department has established regulations that permit recipients of federal funds to "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin . . . even in the absence of prior discrimination." 34 C.F.R. § 100.3(b)(6)(ii).

In overseeing the Department's activities, Congress has commended the Department's recognition "that diversity is a legally acceptable form of affirmative action." H.R. REP. NO. 102-1086, at 211 (1992). These statutes and regulations reflect a determination by both Congress and the executive branch that the Constitution permits state educators and other governmental officials to engage in race-conscious decision making to comply with federal laws promoting racial equality. This position is consistent with the views of a majority of this Court's justices. *Vera*, 517 U.S. at 977-78 (O'Connor, J., principal opinion); *id.* at 994-95 (O'Connor, J., concurring); *id.* at 1034-35 (Stevens, J., dissenting); *id.* at 1065 (Souter, J., dissenting). Reaffirming this principle in the area of education will facilitate Congress' historic commitment to providing broad access to educational activities financed with federal funds, and will preserve Congress' ability to address the persistence of both the fact and the effects of racial inequality.

For over a decade, Congress has consistently reaffirmed its determination that race-conscious action is constitutional. Numerous recent enactments provide for the consideration of race in the distribution of scholarship funds. *See, e.g.*, 42 U.S.C. § 1862n-1(c)(2) (requiring that consideration be given to "the goal of promoting the participation" of students from disadvantaged backgrounds, including racial minorities, in awarding grants for math, science and engineering students); H.R. REP. NO. 107-229, at 18 (2001) (promoting "nursing workforce diversity" by providing funding for increased nursing education opportunities for racial and ethnic minorities and other disadvantaged students); H.R. REP. NO. 106-645, at 23, 116 (2000) (providing funding to "increase the

number of minority students who pursue advanced degrees and careers" in science and encouraging the development of specific numerical goals for the program). These enactments continue a long-standing trend in congressional activity requiring consideration of race as a factor in decision making. *See, e.g.*, 20 U.S.C. § 1136 (establishing Thurgood Marshall Legal Opportunity Program to assist "low-income, minority, or disadvantaged college students" with access to legal education); 20 U.S.C. § 1131 (creating Minority Foreign Service Professional Development Program to "significantly increase the number of African American and other underrepresented minorities in the international service").

In addition to crafting legislation that relies on limited consideration of race by those charged with the law's administration, Congress has consistently rejected bills introduced to eliminate or prohibit race-conscious decision making needed to promote access to government resources and benefits. With the benefit of this Court's decision in *Adarand*, Congress has reached a considered decision to preserve race as one factor in providing access to the benefits of federal programs and initiatives. For example, the 105th Congress rejected the "Riggs Amendment," which would have prohibited "discrimination and preferential treatment in connection with admissions to institutions of higher education" under the Higher Education Act of 1965. *See* English Language Fluency Act, H.R. 3892, 105th Cong. (1998). Likewise, in 1997, a bipartisan majority of the House Judiciary Committee voted to table H.R. 1909, a bill sponsored by Representative Canady that would have prohibited the consideration of race or gender in any federal program or initiative. *See* Civil Rights Act of

1997, H.R. 1909, 105th Cong. (1997). Elected representatives of both parties have joined together to preserve race-conscious decision making as a tool for fulfilling Congress' constitutional charge to eradicate the legacy of inequality that results from this nation's long history of racial discrimination by providing broad access to the programs, opportunities, and resources sponsored by the federal government.

By contrast, this nation's history demonstrates that resistance to access to public resources for racial minorities develops where the federal government has shown leniency rather than leadership. A decision by this Court mandating purportedly race-neutral policies whose indicia of success measure access to government resources at a general rather than specific program level would frustrate Congress's efforts to combat the effects of discrimination. Such policies may permit a state to avoid its compliance obligations under federal law. Under such a standard, states potentially could use otherwise facially neutral standards, such as different admission indexes or awarding extra points for courses not offered in schools that serve minority individuals, to institute or reinstitute a dual university system in which there was very little diversity on any campus. In reviewing whether the University of Mississippi had dismantled its dual structure in *Ayers v. Fordice*, 505 U.S. 717 (1992), this Court concluded that concluding that the University of Mississippi's use of different ACT admissions thresholds for automatic admission to specific campuses, though race-neutral, had the purpose and effect of maintaining campuses that are identifiable white and black. *Id.* at 734-39. To permit states to use system-wide numbers to maintain or establish the type of "discriminatory system that should, by

now, be only a distant memory" would be a major departure from this Court's equal protection jurisprudence. *Id.* at 745 (O'Connor, J., concurring).

CONCLUSION

This Court need not tear at the fabric of its equal protection decisions to reaffirm the compelling nature of a state's interest in the educational and political benefits that flow from a diverse student body. The standards applied to race-conscious decision making in recent redistricting cases provide an established and entirely appropriate means of evaluating the University's and the Law School's consideration of race as one of several factors in its admissions process. Application of these standards is consistent with Justice Powell's opinion in *Bakke* and this Court's other recent decisions in the area of equal protection. Application of the race-consciousness standard in this context also will confirm this Court's prior guidance to other governmental decision makers as to the way in which race may be taken into account in situations where it is a critical aspect of responding to an identified need. This prior guidance has resulted in enactment of race conscious admissions criteria that have been effective to obtain educational diversity without resort to quotas. The University and the Law School's consideration of race in admissions furthers the compelling interest in educational diversity and the resulting benefits in education and political participation that flow to the school's students and society at large. Michigan educators' discretion in this regard is constitutional. The decisions of the Court of

Appeals for the Sixth Circuit and the U.S. District Court for the Eastern District of Michigan should be upheld.

Respectfully submitted,

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